No. 37

In the Supreme Court of the United States

OCTOBER TERM, 1958

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

LUBLIN, McGAUGHY & ASSOCIATES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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The judgment of the Court of Appeals was entered on November 25, 1957 (R. 154a). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

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Respondents are partners in a consultant architectural-enginering business—with offices in Norfolk, Virginia and in Washington, D. C., and foreign asso-

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JURISDICTION

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QUESTION PRESENTED

Respondents are partners in a consultant architectural-enginering business—with offices in Norfolk, Virginia and in Washington, D. C., and foreign asso-

ciates overseas—engaged in preparing plans and specifications essentially for industrial, as distinguished from residential, projects. A substantial proportion of their work is for out-of-state clientele or projects, and the great bulk of it consists of the preparation of plans and specifications for federal, state and municipal governmental projects, many of which are for the improvement, repair, or enlargement of interstate instrumentalists or facilities.

The question presented is: Whether respondents' non-professional employees (draftsmen, fieldmen, and clerical workers)—who work on the plans and specifications for projects for improvement of interstate instrumentalities or facilities, and whose regular duties also include the preparation of drawings, plans, specifications, etc., transmitted across state lines, or direct and substantial interstate communication by telephone and correspondence, or travel across state lines—are engaged "in commerce or in the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

STATUTE INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U. S. C. 201, *et seq.*), are set forth in full in the record (R. 116a-119a). The provisions particularly involved here are Sections 3 (b), (i), and (j), as follows:

> SEC. 3. [52 Stat. 1061; 63 Stat. 911]. As used in this Act—
>
> * * * * *
>
> (b) "Commerce" means trade, commerce, transportation, transmission, or communication among

the several States or between any State and any place outside thereof.

* * * * *

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufacfactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation, directly essential to the production thereof, in any State.

STATEMENT

This action was brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act to enjoin respondents from violating the overtime and record-keeping requirements of the Act with respect to their non-professional employees—draftsmen, fieldmen, and stenographer-bookkeepers.[1]

[1] It is stipulated that, if the Act covers these employees, overtime and record-keeping violations exist (Stip. R. 11a; R. 94a-97a). This action is not concerned with "professional" employees who may meet the requirements for exemption under Section 13 (a) (1) of the Act, which provides:

1. Respondents are partners engaged in a consultant architectural-engineering business, with a principal office in Norfolk, Virginia, and a branch office in Washington, D. C., and with foreign associates in France and Italy.

Respondents' business relates essentially to industrial, as distinguished from residential, projects, and admittedly a substantial amount of their work is for out-of-state projects and out-of-state clientele, at least 50% of the work of the Washington office relating to out-of-state projects (R. 13a). As summarized in the opinion below, "[t]hey have worked and are now employed on numerous projects in Virginia, Maryland and the District of Columbia, and have worked on some projects in North Carolina and overseas" (R.143a-144a). "These activities require constant coordination and communication, as well as transmission of information and materials between the two offices" (R.144a). The plans and specifications are "frequently transmitted out of state" (R. 6a), both between respondents' offices for correlation, integration or review (R. 68a, 72a), and, as indicated in more detail, *infra*, pp. 7-10, to out-of-state clients with copies for out-of-state bidders, contractors and suppliers of materials (R. 144a).

"(a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); * * *."

The exemption issue was not raised by respondents in the courts below and is not presented here, the only issue being whether employees who do not qualify as exempt "professional" employees as defined and delimited by the Secretary of Labor are within the general coverage of the Act. See 29 C. F. R. (1957 Supp.) Pt. 541.3; 14 F. R. 7705.

Respondents employ a total of 65 to 70 employees (including professional and non-professional), of whom about 30 are in the Norfolk office, about 20 in the Washington office, and about 15 to 20 overseas (R. 12a, 85a). With "a direct private telephone line between the Norfolk and Washington offices," "telephonic communications are numerous and the line is used for the purpose of controlling, supervising and coordinating the work of the Washington office from Norfolk" (R. 5a). Also, "payrolls for both offices, as well as for employees in foreign offices are made up in the Norfolk office and checks are mailed to Washington and foreign countries" (*ibid*). No set rule is maintained with respect to where a set of plans is prepared—"if we want to do part in Washington we do it; if we want to do part in Norfolk, we do it" (R. 68a). As both the trial court and the Court of Appeals found, respondents' non-professional draftsmen, fieldmen and clerical employees engage substantially in the extensive interstate communications or interstate travel incident to respondents' business and in the preparation of plans, drawings, specifications, etc., "many of which are transmitted across state lines," and many of which are prepared for interstate projects (R. 5a-6a; 144a-46a).

2. The great bulk of respondents' business consists of the preparation of plans, specifications and drawings for federal, state and municipal governmental projects. As stated in the opinion below, they "include, primarily, projects for the improvement, enlargement and repair of installations at military bases, airfields, shipyards and radio stations for the United States military services, and also a substantial number of state and municipal undertakings and projects." (R. 144a.)

About 60 percent of the work of the Virginia office is done pursuant to contracts with United States Army and Navy agencies, and about 85 percent of the work of the Washington office is for the Army and Navy or for state and municipal government agencies (R. 2a). "Projects for the improvement or repair of interstate instrumentalities on which the defendants have worked include airfields and airplane facilities for which streets are widened or constructed, hangers are repaired or altered, and extensions are built. Radio and television facilities are relocated, repairs to government buildings at shipyards and machine shops are made, and other work in Maryland, Virginia and North Carolina is constructed" (Op. below, R. 146a).[2]

3. The plans and specifications furnished by respondents for such projects contain detailed drawings, blueprints, surveys, estimates and other data together with specific detailed instructions to the builder on every aspect of the actual construction work. The industrial-type projects, and particularly the government projects, on which respondents have been primarily engaged "are intricate in design and construction and could not be constructed without the plans and specifications prepared by the [respondents'] employees" (Op. below, R. 144a; R. 48a-49a). These plans and specifications obviously include much more than a professional architect's designs and advice. As is illustrated by the voluminous sets of plans and specifications prepared by respondents for projects listed in

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[2] For details of the numerous projects for improvement, repair, or enlargement of interstate instrumentalities or facilities, on which respondents worked for the two year period ending April 1956, see the Appendix, *infra*, pp. 52-54.

Appendix A to the stipulation (R. 18a-29a),[3] most of the work is evidently more engineering than architectural in nature, and it involves the assembling and compilation of detailed estimates, measurements, field survey information, materials and equipment specifications, carpentry, electrical and other construction data, and similar routine work of a non-professional nature.

The plans and specifications include in minute detail all of the data, information, and instructions needed to guide the clients and their contractors, subcontractors and material suppliers, in bidding, financing, purchasing materials and equipment, as well as in carrying out the actual construction work (R. 100a). The specifications include not only the general conditions, which are to govern the construction work, but also specific data in regard to the kinds, types, sizes of materials to be used, and where and how they enter into the construction. For example, on projects requiring substantial brick work or concrete, the composition and precise proportions of the mixture of brick mortar and concrete, as well as the method of mixing, are specified in detail. It is common knowledge that plans and specifications for government construction projects, in particular, require such detailed data and instructions.

4. The plans and specifications prepared for various federal, state, and municipal government agencies (which have been the source of the bulk of respondents' business, Stip. R. 13a) are submitted to these agencies in their original form and become the property of the

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[3] Representative samples of such plans and specifications were attached to the stipulation as Appendix C (R. 12a, 33a) and an illustrative set of specifications was introduced as Plaintiff's Exh. 4 (R. 44a-45a). Because of their bulk, they were filed in original form and were not printed in the record.

agencies (Stip. R. 14a). Since such government agencies frequently require numerous copies of the specifications, respondents prepare and furnish "original, reproducible drawings and tracings (plans), and stencils for making multiple copies" (Stip. R. 13a). As stated in the findings of the trial court, the "government contracts admittedly require a great number of specifications which are reproduced by an independent blueprint company and are subsequently sent by the government agencies to prospective bidders, many of whom are without the State of Virginia and the District of Columbia" (R. 2a-3a; 145a).

A large portion of the governmental work (the full 60 percent at the Norfolk office) is done for the United States Army and Navy (R. 2a-3a). The plans, drawings, specifications, estimates, and advance-planning reports prepared by respondents' employees for these projects are furnished primarily to the Corps of Engineers, the Fifth Naval District, and the Potomac River Naval Command (R. 112a, 113a, 68a). Copies of all preliminary plans, specifications, and analyses of design furnished to the Norfolk District Corps of Engineers are transmitted to the Division Engineer, North Atlantic Division, New York, for review and approval; for large projects, marked-up drafts of final specifications are also transmitted to New York for review and approval; and in all cases, a set of the completed final plans and specifications as furnished to prospective bidders are transmitted to the North Atlantic Division in New York for record purposes (Govt's. Exh. No. 2, R. 113a-114a). Similarly, all advance-planning reports and copies of all plans and specifications furnished by respondents to the Fifth Naval District at Norfolk are

forwarded to the Bureau of Yards and Docks, Washington, D. C., for review and approval (Govt's. Exh. No. 1, R. 112a-113a).

Copies of the final plans and specifications are also sent to any out-of-state contractors who are interested in submitting bids (Govt's Exhs. 1, 2 and 3, R. 112a-115a). In connection with any proposed large project, it is the regular practice of the Corps of Engineers to send out advance notice to approximately 400 general contractors, major subcontractors and suppliers, and this notice "always results in requests for sets of plans and specifications from several out-of-state contracting firms," in response to which sets are sent to "several firms outside the State of Virginia to enable them to prepare and submit bids" (R. 115a). Since general contractors need more than one set, two or three sets of plans and specifications are sent upon request (*ibid.*). With respect to projects for the Army and Navy agencies, respondents have reason and knowledge to expect that copies of the plans and specifications furnished by them will be thus sent out-of-state to prospective bidders (R. 46a-47a).

There is, also, interstate transmission of plans, drawings and specifications for municipal governmental projects. The numerous surveys, drawings, plans, etc. for the approximately 50 individual projects for the Washington Suburban Sanitation Commission, located in Maryland (Jobs Nos. 893-893-3, 939-939-24; R. 23a, 26a-27a, 65a), were prepared in respondents' District of Columbia office and submitted to the Commission at its headquarters in Hyattsville, Maryland; in addition to the final plans, several drafts of preliminary plans and drawings relating to particular projects were thus

transmitted out-of-state to the Commission for approval, examination, and suggestions (R. 65a).[4]

5. The decision below that none of respondents' employees is engaged "in commerce or in the production of goods for commerce" within the coverage of the Act rested, basically, on the ground that the preparation of plans and specifications by an independent architectural-engineering consultant firm is an "essentially local" business and that any interstate activities are "merely incidental to the local enterprise" (R. 151a). Although recognizing that the plans and specifications "consist of physical material" and that "many * * * are transmitted across state lines" (R. 144a), the Court of Appeals held that their preparation was not production of "goods" for "commerce" within the meaning of the statutory definitions because they are "only the written embodiment of professional advice * * * specifically prepared to meet the particular problem of a specific client and are not sold or offered for

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[4] There is likewise considerable interstate transmission of plans and specifications for non-governmental projects to out-of-state bidders (R. 61a-62a), or to out-of-state representatives of important prospective tenants for approval (R. 58a-59a, 63a-64a). Where respondents' employees supervise the actual construction of the projects (for about 50 percent of their non-governmental clients, R. 15a), "shop drawings" on articles, materials, and equipment to be installed or used in the construction are submitted by subcontractors (through the contractor) to respondents, for checking and approval to make sure that the specifications are met. These drawings relate to such equipment and materials as doors, windows, floor material, bricks and prefabricated partitions. Some of the materials or equipment is submitted in the form of samples. After the drawing or samples have been checked and/or corrected they are returned to the contractor and then sent back to the manufacturer or supplier. According to an employee in the Norfolk office, one-half of the drawings examined and corrected by him were from manufacturers located outside the State of Virginia (R. 81a-83a).

sale to the public generally" (R. 147a). The admitted direct and substantial participation in interstate communications and transmission of information and materials, and interstate travel, by individual employees, and their work in preparing plans and specifications for specific interstate projects, were held to be outside the scope of the Act on the ground that "[a]ll of these activities related to the production of plans, partook of their intrastate character, and cannot be fairly characterized as commerce between states" (R. 151a).

SUMMARY OF ARGUMENT

The undisputed facts, as described in the opinions of both courts below, contradict any characterization of respondent's business as "essentially local" and establish beyond doubt that respondents' non-professional employees regularly and substantially work on plans, specifications and materials for transmission across state lines and for projects for the improvement of interstate facilities, as well as engage extensively in the interstate communications or interstate travel necessitated by the nature of respondents' multi-state organization and out-of-state clientele and operations. These facts amply suffice to bring respondents' employees within the terms of both phases of the Fair Labor Standards Act's coverage ("in commerce" and "in the production of goods for commerce") on any one of several separate grounds.

A

The employees' regular preparation of plans and specifications essential to the construction of projects for improvement of interstate instrumentalities and facilities brings them within the Act's "in commerce"

coverage. That employees engaged in the construction of projects for the improvement or repair of interstate instrumentalities (such as the airfields and airplane facilities, shipyards and radio and television facilities here involved) are engaged "in commerce" is now well established and was not questioned below (see *e.g.*, *Mitchell* v. *Vollmer & Co.*, 349 U.S. 427). The ruling below that such coverage does not include the preparation of plans, specifications and other materials specifically designed for such interstate projects is inconsistent with the principles of this Court's decisions (most recently reaffirmed in *Vollmer*, 349 U.S. 427), and conflicts with decisions of every other court of appeals which has ruled on the issue.

1. The Eighth Circuit in *Mitchell* v. *Brown Engineering Co.*, 224 F. 2d 359, certiorari denied, 350 U.S. 875, with whose reasoning and result the decision below is in direct conflict, correctly applied *Vollmer's* principles of "liberal construction" and "practical considerations," and its test of coverage, *i.e.*, whether the *employees' work* is so related to the interstate improvement project "as to be, in practical effect, a part of it, rather than isolated, local activity" (349 U.S. at 429). Viewing the preparation of plans and specifications "in a practical aspect in relation to the whole construction project" for which the plans and specifications are specifically designed, the Eighth Circuit concluded that such work is no more "isolated local activity" than "actual manual labor on the projects under repair and improvement" (224 F. 2d at 364-365). The Fourth Circuit's contrary view, which would exclude such work because *the employer* is an independent enterprise or because the work is not performed "at the site of construction," ignores "practical con-

siderations" such as the vital and intimate relation of plans and specifications to such interstate improvement projects (*Vollmer*, 349 U.S. at 429). It is also inconsistent (a) with the well-settled principle that coverage is "determined on the basis of the employee's activity and not by the nature of the employer's business" (*Brown Engineering, supra*, at 365; *Overstreet* v. *North Shore Corp.*, 318 U.S. 125, 132), as well as (b) with this Court's decisions rejecting the distinction between "on-the-road" and "off-the-road" workers (*Alstate Construction Co.* v. *Durkin*, 345 U.S. 13, 16; *Thomas* v. *Hempt Bros.*, 345 U.S. 19; see also *Tobin* v. *Pennington-Winter Construction Co.*, 198 F. 2d 334 (C.A. 10), certiorari denied, 345 U.S. 915).

Even prior to *Vollmer*, the Second and Ninth Courts of Appeals (in *Laudadio* v. *White Construction Co.*, 163 F. 2d 383 (C.A. 2) and *Ritch* v. *Puget Sound Bridge and Dredging Co.*, 156 F. 2d 334 (C.A. 9)) upheld the coverage of "off-the-site" draftsmen and clerical workers preparing plans and drawings for projects of the same kind that comprise a primary part of the business of respondents' firm here, on the ground that no distinction could rationally be drawn between the so-called "white collar" workers (the "draftsmen engaged in designing and laying out the work to be done by others") and the workers engaged in the actual dredging and construction operations which were performed *"all pursuant to the draftsmen's plans"* (156 F. 2d at 337, emphasis added).

2. The decision below mistakenly relied mainly, if not solely, upon *10 East 40th Street* v. *Callus*, 325 U.S. 578. In marked contrast to the instant case, *neither the employer nor the employees* in *Callus* engaged di-

rectly in any interstate activities and none of the employees' work (general building maintenance service) was specifically designed for particular interstate projects, the claim of coverage resting solely upon "thin" evidence of a general relationship to interstate manufacturing carried on by *some* of the building tenants elsewhere. *Callus* thus lends no support to the conclusion that individual employees engaged substantially and directly in interstate activities are excluded from the Act's coverage, even if the employer's business were shown to be an "essentially local" enterprise. As pointed out above, the rule is to the contrary—this Court has "repeatedly said, the application of the Act depends upon the character of the employees' activities" (*Overstreet*, 318 U.S. at 132). The interstate aspects of respondents' business here, and the individual employees' regular participation in such interstate activities, are unquestionably substantial enough to require application of this principle, and to preclude the sweeping general exemption from the Act that the decision below would provide.

Nor is *Callus* authority for excluding from the Act's coverage the interstate activities of respondents' employees simply because they are employed by an "independent enterprise" performing work "for a general miscellany of clients". This is evident from the numerous decisions holding the Act applicable to employees of independent enterprises dealing with a miscellany of customers where a regular and substantial proportion of the customers were interstate producers or interstate instrumentalities (*Roland Electric Co.* v. *Walling*, 326 U.S. 657; *Thomas* v. *Hempt Bros.*, 345 U.S. 19; and *Schulte Co.* v. *Gangi*, 328 U.S. 108). Also, it is well-settled that the Act applies to a wide

variety of businesses serving locally a general miscellany of customers including electric and gas companies, water companies, ice companies, coal distributing companies and telephone companies. The application of the Act to such businesses was expressly approved by Congress at the time of the enactment of the 1949 Amendments as was the coverage ruling of *Roland Electric, supra,* the Congressional reports specifically stating that employees of such companies "will remain subject to the Act, *notwithstanding they are employed by an independent employer* * * *" (House Report, 95 Cong. Rec. 14929, emphasis added; Senate Report, 95 Cong. Rec. 14874-75).

B

The interstate communications and transmission of documents and materials and the interstate travel, in which respondents' employees regularly and substantially engage, is clearly engagement "in commerce" within the Act's coverage. These interstate activities, which are admittedly necessitated by the nature of respondents' multi-state organization, are not only "transportation, transmission or communication" within the literal terms of the statutory definition, but are undeniably "so directly and vitally related to the functioning of" and so "integral a part of" respondents' extensive interstate operations as a whole, as to be a part of those interstate operations, "rather than isolated local activity," under any "liberal" or "practical" view of the case. Even in the absence of express statutory inclusion of interstate "communication," this Court has repeatedly held that the interstate use of the mails to transmit communications of the same or similar type here involved constitutes interstate com-

merce, and the Court's decisions are equally clear that interstate travel or movement of persons across state lines, even for non-commercial purposes, is interstate commerce.

There is nothing in the policy and purposes of the Fair Labor Standards Act which would warrant straining to restrict its "in commerce" coverage more narrowly than the same or comparable statutory language in other federal regulatory acts. On the contrary, such a restrictive construction is inconsistent with this Court's ruling that "the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce" (*Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 567) and that "the policy of Congressional abnegation with respect to occupations affecting commerce is no reason for narrowly circumscribing the phrase 'engaged in commerce'" (*Overstreet* v. *North Shore Corp.*, 318 U.S. 125, 128). It is also inconsistent with the principles that this Act's coverage provisions must be given a "liberal" construction (*Vollmer*, 349 U.S. at 429) and accorded the "breadth of coverage" consistent with its "terms of substantial universality" (*Powell* v. *United States Cartridge Co.*, 339 U.S. 497, 516). These principles clearly support the recent decisions of the Eighth and First Circuits upholding the coverage of interstate travel and interstate communications in circumstances comparable to the instant case. *Mitchell* v. *Kroger Co.*, 248 F. 2d 935 (C.A. 8) and *Aetna Finance Co.* v. *Mitchell*, 247 F. 2d 190 (C.A. 1).

C

The non-professional physical preparation of plans, specifications, and drawings for transmission across

state lines, or for use in the construction of repairs or improvements to interstate instrumentalities and facilities, also constitutes "production of goods for commerce." As both courts below apparently conceded, if the plans, specifications, etc. are "goods" within the meaning of the statutory definition of Section 3(i), the employees preparing them are "producing" ("handling, transporting, or in any other manner working on") them for "commerce" ("transmission * * * between any State and any place outside thereof") within the terms of Sections 3(j) and (b) of the Act.

1. The view that plans and specifications are not "articles or subjects of commerce" simply because they represent the "embodiment of ideas" (R. 148a) is difficult to reconcile with the ruling in *Western Union Telegraph Co.* v. *Lenroot*, 323 U.S. 490, that "telegraphic messages are clearly 'subjects of commerce' and hence that they are 'goods' under this Act," or with the "unmistakable evidence [in the legislative history] of a purpose to extend the definition * * * to everything which had been considered a 'subject of commerce'; that is, to whatever Congress could regulate as such a subject" (see 141 F. 2d 400 at 403). The physical embodiment of mental ideas into tangible and bulky plans and specifications obviously involves considerable routine, clerical and other physical labor by workers of the type with whom this Act was concerned, and the products of this labor are tangible materials which can be and are "subjects of commerce" (*i.e.*, interstate "transportation" or "transmission") within the literal terms of the statutory definitions.

2. The position that such work is outside the Act because *incidental* to professional planning and advice

is contradicted by *Borden Co.* v. *Borella*, 325 U.S. 679, where maintenance employees of Borden's central office building for its executive officers and administrative employees were held within the Act's coverage, on the ground that the "economic production" with which this Act is concerned includes "not simply the manual, physical labor involved in changing the form or utility of a tangible article" but also "planning and control" and the work of one "who conceives or directs a productive activity" (325 U. S. at 683). The Act's "professional" *exemption* (Section 13(a)(1))—not involved in the present case—must be sharply distinguished from its coverage provisions, 325 U.S. at 684.

3. The view that plans and specifications are not "goods for commerce" because they lack the characteristics of ordinary articles sold commercially to the public generally (R. 148a-149a) is contrary to the basic rationale of *Powell* v. *United States Cartridge Co.*, 339 U.S. 497, which explicitly repudiated the contention that coverage is limited to "commercial" transactions or to "articles that are intended for sale, exchange or other trading activities" (339 U.S. at 512), while emphasizing the "terms of substantial universality" in which the broad statutory purposes and the statutory coverage definitions are stated (*id.* at 509-516).

4. The plans and specifications prepared specifically for use in the repair or improvement of interstate instrumentalities or facilities are also produced "for commerce" under the principles of this Court's decisions in *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13, and *Thomas* v. *Hempt Bros.*, 345 U. S. 19. While the road materials there involved may be physically incorporated into the road, the plans and specifications guide and determine the execution of the

improvement in every detail (including the instructions and specifications for the supplies and materials to be physically incorporated in the interstate structures) from the beginning to the end of the construction work. Even if such plans and specifications were not themselves "goods," their preparation is a "closely related process or occupation directly essential" to the production of the supplies and materials (indisputably "goods") for such commerce, no less than the preparation of "tools, dies, designs, patterns * * * or other equipment" used by the purchaser "in the production of other goods for interstate commerce," or the furnishing of gas, electricity, fuel or water for use in the production of goods for commerce, which have been expressly recognized by Congress as "closely related and directly essential to the production of goods for commerce" within the terms of Section 3(j), as amended in 1949. See House Conferees' Report of the 1949 Amendments, 95 Cong. Rec. 14874; and Report of the Majority of Senate Conferees, 95 Cong. Rec. 14928.

ARGUMENT

Respondents' Non-Professional Employees (Draftsmen, Fieldmen and Clerical Employees) Are Engaged Both "in Commerce" and "in the Production of Goods for Commerce" Within the Meaning of the Fair Labor Standards Act

The undisputed facts regarding the activities of respondents' non-professional employees, as described in the opinions of both courts below, undeniably fall within the literal terms of both phases of the coverage of the Fair Labor Standards Act. Not only is respondents' business admittedly organized to operate in two states (and overseas) so as to "require constant coordination and communication, as well as transmission of informa-

tion and materials between the two offices" (R. 144a), but both offices admittedly deal substantially with out-of-state and overseas clients and with out-of-state bidders, contractors and suppliers, and perform work for out-of-state projects, and primarily for the improvement, enlargement and repair of interstate instrumentalities or facilities (see the Statement, *supra*, pp. 4-10).

Factually, therefore, respondents' business is unquestionably of an interstate character in almost every aspect, and the regular activities of the individual *employees* concededly include frequent and numerous interstate communications and transmission of information and materials by "all stenographic personnel," frequent interstate travel together with interstate transmission of data by fieldmen, and preparation of drawings, specifications, plans and estimates ("many of which are transmitted across state lines") by draftsmen (R. 5a-6a, 144a), as well as substantial work by all on plans and specifications essential to projects for the repair or improvement of interstate instrumentalities (see the Statement, *supra*, pp. 5-6).

These conceded facts, we believe, contradict the characterization of respondents' business as "essentially local," and amply suffice to meet the statutory standards for coverage on any one of several separate grounds.

A. *The Employees' Regular Preparation of Plans and Specifications Essential to the Construction of Projects for Improvement of Interstate Instrumentalities and Facilities Brings Them Within the Act's "In Commerce" Coverage.*

As found by the court below, the great bulk of respondents' business consists of preparation of plans,

specifications and drawings for governmental projects, which "include, primarily, projects for the improvement, enlargement and repair of installations at military bases, airfields, shipyards and radio stations for the United States military services, and also a substantial number of state and municipal undertakings and projects" (R. 144a). The court further found: "Projects for the improvement or repair of interstate instrumentalities on which the defendants have worked include airfields and airplane facilities for which streets are widened or constructed, hangers are repaired or altered, and extensions are built," relocation of "[r]adio and television facilities * * *, repairs to government buildings at shipyards * * *" (R. 146a).

That construction of such projects is "in commerce" within the meaning of the Act was not questioned by the Court of Appeals and is now well-settled.[5] The

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[5] *Mitchell* v. *C. W. Vollmer & Co.*, 349 U.S. 427 (construction of new lock and dam for the improvement of the Gulf Intercoastal Waterway); *Tobin* v. *Pennington-Winter Construction Company*, 198 F.2d 334 (C.A. 10), certiorari denied, 345 U.S. 915 (construction of a multi-purpose dam for improvement of the Arkansas and Mississippi Rivers); *Walling* v. *Patton-Tulley Transportation Co.*, 134 F.2d 945 (C.A. 6) (construction of new dikes and revetments on the Mississippi River); *Ritch* v. *Puget Sound Bridge and Dredging Co.*, 156 F.2d 334 (C.A. 9) (dredging of a new channel and construction of a new pier with retaining walls at Bremerton Harbor); *Tobin* v. *Ramey*, 205 F.2d 606 (C.A. 5), rehearing denied, 206 F.2d 505, certiorari denied *sub nom. Hughes Const. Co.* v. *Secretary of Labor*, 346 U.S. 925 (enlargement of a set-back levee, which, though a segment of the Mississippi levee system, was three to six miles from the river's banks); *Bennett* v. *V. P. Loftis Co.*, 167 F.2d 286 (C.A. 4) (construction of a new bridge for highway improvement); *Mitchell* v. *Empire Gas Engineering Co.*, 13 WH Cases 721 (not officially reported) (C.A. 5) (construction of jet-fueling system on air base); *Archer* v. *Brown & Root, Inc.*, 241 F.2d 663 (C.A. 5) (construction of a new 25-mile causeway and bridge to connect with interstate highway); *Mitchell* v. *Raines*, 238 F.2d

issue is whether the preparation of plans and specifications for the projects is not also "in commerce."

1. The ruling that the employees' work on the plans and specifications prepared specifically for the projects is "essentially local," rather than a part of these interstate repair or improvement projects, conflicts directly with the decision of the Eighth Circuit in *Mitchell* v. *Brown Engineering Co.*, 224 F. 2d 359, certiorari denied, 350 U.S. 875, and is also inconsistent with every other circuit which has had occasion to rule on similar issues (*Laudadio* v. *White Construction Co.*, 163 F. 2d 383 (C.A. 2); *Ritch* v. *Puget Sound Bridge and Dredging Co.*, 156 F. 2d 334 (C.A. 9); see also *Tobin* v. *Pennington-Winter Const. Co.*, 198 F. 2d 334 (C.A. 10), certiorari denied, 345 U.S. 915, and *Archer* v. *Brown & Root, Inc.*, 241 F. 2d 663 (C.A. 5), certiorari denied, 355 U.S. 825). We submit that the plain statutory terms, as well as the decisions of this Court construing the Act's coverage, support these other rulings rather than the holding of the court below. *Mitchell* v. *C. W. Vollmer & Co.*, 349 U.S. 427; *Overstreet* v. *North Shore Corp.*, 318 U.S. 125; *Fitzgerald Co.* v. *Pedersen*,

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186 (C.A. 5), (improvements to Georgia State Highway system); *Mitchell* v. *Brown Engineering Co.*, 224 F.2d 359 (C.A. 8), certiorari denied, 350 U.S. 875 (highway improvement projects); *Mitchell* v. *Hodges Contracting Co.*, 238 F.2d 380 (C.A. 5) (radio-TV improvement and replacement); *Walling* v. *McCrady Construction Co.*, 156 F.2d 932 (C.A. 3), certiorari denied, 329 U.S. 785 (road improvement projects); *Laudadio* v. *White Construction Co.*, 163 F.2d 383 (C.A. 2) (construction of extensions to airport runways and additions to hangars). See also *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13 (production of road materials for use in highway improvement projects); *Tobin* v. *Johnson*, 198 F.2d 130 (C.A. 8), certiorari denied, 345 U.S. 915 (same as *Alstate*); *Schmitt* v. *War Emergency Pipelines*, 175 F.2d 335 (C.A. 8), certiorari denied, 338 U.S. U.S. 869 (construction of extensions to oil pipelines).

324 U.S. 720; *Alstate Const. Co.* v. *Durkin*, 345 U.S. 13; *Thomas* v. *Hempt Bros.*, 345 U.S. 19.

The work of preparing surveys, plans, specifications, and designs for use in the repair or improvement of existing interstate instrumentalities and facilities is as much a part of "the work of improving existing facilities of interstate commerce" and "of the redesigning of an existing facility of interstate commerce" (see 349 U.S. at 430), as was the "building of guide levees"—an initial step in the construction of the lock and canal improvement to an existing interstate waterway—held covered in *Vollmer, supra.* These necessary preliminary tasks are nonetheless "essentially a part of the larger one" of accomplishing the repair or improvement of the interstate facility (see *Pedersen* v. *Delaware, L. & W.R.R. Co.*, 229 U.S. 146, 152). The surveys and specifications are indeed the immediate foundation upon which all of the succeeding (admittedly covered) construction work depends. It is clearly not "isolated, local activity" but is rather "in practical effect, a part of" the improvement of the interstate facility (*Vollmer*, 349 U. S. at 429).

Applying the principles of this Court's *Vollmer* decision, the Eighth Circuit in *Brown Engineering, supra,* which involved precisely the same type of employees of a firm engaged in precisely the same kind of consultant, architectural-engineering business, found no difficulty in holding the non-professional employees to be engaged "in commerce" by reason of their participation in the preparation of plans and specifications for the repair and improvement of roads, highways and power plant facilities. Even though the *Brown Engineering* firm limited its operations to such projects within the same state and had no out-of-state branch offices or asso-

ciates, the Eighth Circuit rejected the contention (strenously urged there with much more reason than the facts of the instant case would justify) that consultant architectural-engineering work is an "essentially local" business and that the preparation of plans and specifications was too remote from the repair and improvement of the interstate instrumentalities to be within the scope of the Act's coverage.[6]

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[6] Not only is the characterization of "essentially local" contradicted by the facts in the record of the instant case, but it is contrary to the well-recognized fact that the business of most consultant architectural-engineering firms in the modern industrial pattern is *not* limited to one State and depends substantially upon interstate operations. As pointed out in the Government's petition for a writ of certiorari in the present case (pp. 25-28), a recent comprehensive survey of the private practice of engineering in the United States by the publication *Consulting Engineer* (January and February 1957 issues) reports that most of the firms in this field do *not* limit their operations to any one state; 72 percent of the consulting firms being active in more than one state, and 28 percent having expanded their geographical range to foreign projects. The survey emphasizes that "consulting engineers are greatly expanding their geographical range," the situation being "quite different" today from "the scope of operations of firms when first organized," at which time 53% of the firms (in contrast to only 28% today) limited themselves to operation within one state, and adds that "This geographical expansion will continue" (February issue, p. 79).

In addition to this expansion into direct interstate operation, the survey shows that industrial work (particularly for federal, state, and municipal governments) constitutes a major part of the business in this field and is constantly increasing (February issue, p. 81, Table 4, p. 82). Some indication of the substantiality of this type of work is evidenced by the expenditures of the Army and Navy for architectural and engineering contract work during the year 1957, which totaled over $113,000,000 (on almost 2,000 contracts for $10,000 or more each). Another major source of the business of such firms is highway construction. According to the Annual Report of the Bureau of Public Roads for Fiscal Year 1955, the state highway departments had committed 3.5 million dollars for fees to private engineering firms in connection with their federally-

In contrast with the Fourth Circuit's narrow and mistaken view of the nature of this type of work, the Eighth Circuit correctly viewed the preparation of plans and specifications "in a practical aspect in relation to the whole construction project" for which the plans and specifications were specifically designed, and concluded that such work is no more "isolated local activity" than "actual manual labor on the projects under repair and improvement" (224 F. 2d at 364, 365). The fact that the employer was engaged in an "independent enterprise," which the Fourth Circuit evidently regarded as of major significance, was correctly described by the Eighth Circuit as "of minor significance," in view of the settled principle that coverage is "determined on the basis of the employee's activity and not by the nature of the employer's business" (citing this Court's decision in *Overstreet* v. *North Shore Corp.*, 318 U.S. 125, 132 (224 F. 2d at 365)); see also *Kirschbaum Co.* v. *Walling*, 316 U.S. 517, 524; *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 571-572.[7]

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aided road projects alone (Annual Report, p. 7). This type of business will, of course, be considerably increased under the gigantic road construction program initiated by the 24 billion dollar Federal-Aid Highway Act of 1956 (Public Law 627—84th Cong., 2d Sess., 70 Stat. 374). The Department of Commerce has estimated that the cost of preliminary engineering (surveys, detail plans, specifications and contract documents) required for this program will exceed 1¼ billion dollars (House Document No. 300, 85th Cong., 2d Sess., p. 4, Table C, p. 6).

[7] As this Court has "repeatedly said, the application of the Act depends upon the character of the employees' activities" (*Overstreet*, 318 U.S. at 132), and therefore "the fact that all of respondent's business is not shown to have an interstate character is not important" (*Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 571-572). Thus, although the "bulk of the merchandise" handled in the ware-

Although the Fourth Circuit stated this principle (R. 152a), it proceeded to follow the opposite course, not only taking "the occupation of the employer * * * into consideration" but manifestly making it the controlling factor. For the opinion below itself concedes that "[u]ndoubtedly the term 'in commerce' covers not only the activity of workers who share directly in the work of construction but also those who do the paper work such as the preparation of lists of material or payrolls, or who serve as fieldmen and timekeepers on the job." It also recognizes that other Courts of Appeals (the Second and Ninth in *Laudadio* v. *White Construction Co.*, 163 F. 2d 383, and *Ritch* v. *Puget Sound Bridge and Dredging Co.*, 156 F. 2d 334) have held the "preparation of plans or drawings * * * by employees of the [construction] contractor" were engaged in commerce (R. 151a).[8]

In the *Laudadio* and *Ritch* cases, the Courts of Appeals held that the Act covered draftsmen and clerical

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houses in *Jacksonville Paper* was for "local disposition" (317 U.S. at 566, 570), the Court specifically ruled that (at 571):

> The use of the words "in commerce" entails an analysis of the various types of transactions and the particular course of business * * *. The fact that all of respondent's business is not shown to have an interstate character is not important. The applicability of the Act is dependent on the character of the employees' work. * * *

This principle applies even "where the employer is not himself engaged in an industry partaking of interstate commerce," and "in any event, to the extent that his employees are 'engaged in commerce or in the production of goods for commerce,' the employer is himself so engaged" within the meaning of this Act (*Kirschbaum Co.* v. *Walling*, 316 U.S. at 524).

[8] These decisions were distinguished by the court below solely on the ground that they furnished "no clean-cut holding that the work of employees of independent architects, such as are before us in this case, is 'commerce' under the Act."

workers preparing the plans and drawings for, as well as the workers engaged in the actual construction of, projects for the improvement and expansion of interstate instrumentalities. The project in the *Laudadio* case was extension of runways at a naval air base, and the project in *Ritch* was dredging channels for the improvement of the harbor at the Bremerton Navy Yard, *i.e.*, both projects of the same kind that comprise a primary part of the business of the respondents. In opposition to the Fourth Circuit's view that the Act's coverage is limited to employees participating "actively at the site of construction" (R. 153a), the Ninth Circuit in *Ritch* ruled that no such distinction could rationally be drawn between the so-called "white collar" workers (the "draftsmen engaged in designing and laying out the work to be done by others") and the workers engaged in the actual dredging and construction operations which were performed "all pursuant to the draftsmen's plans."[9] This ruling, rather than that of the Fourth Circuit, clearly accords with this Court's decisions. The Fourth Circuit's restriction of coverage to workers "at the site of construction" cor-

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[9] The restricted view expressed in the ruling below is also contrary to the Fourth Circuit's own earlier decision in *Bennett* v. *V. P. Loftis Co.*, 167 F.2d 286. In that case, the court held the night-watchman guarding a road bridge under construction to be engaged "in commerce" within the coverage of the Act, "although [the watchman] took no part in the actual construction of the bridge in the sense of driving nails, or pouring concrete, or the like," on the ground that (167 F.2d at 288):

> If the declared purpose of the Act is to be accomplished, a project should be considered as a whole, in a realistic way; *not broken down into its various phases so as to defeat the purpose of the Act.* This latter unrealistic approach was condemned by the Supreme Court in *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564. [Emphasis added.]

responds to, and is no more tenable than, the distinction between "on-the-road" and "off-the-road" workers which this Court rejected in *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13, 16, and *Thomas* v. *Hempt Bros.*, 345 U.S. 19 (discussed *infra*, pp. 30-31, 47-49).

While these decisions were predicated on the "production of goods for commerce" phase of coverage, a comparable distinction has similarly been rejected in cases predicated on the "in commerce" phase of the Act's coverage. *Tobin* v. *Pennington-Winter Const. Co.*, 198 F. 2d 334 (C.A. 10), certiorari denied, 345 U.S. 915 (holding preliminary "off-the-river" work of clearing a reservoir site for construction of a dam designed as part of a broad comprehensive plan for the improvement of a navigable river to be "in commerce");[10] *Tobin* v. *Ramey*, 205 F. 2d 606 (C.A. 5), certiorari denied, 346 U.S. 925 (holding "off-the-river" construction of a set-back levee to be "in commerce"); *Archer* v. *Brown & Root, Inc.*, 241 F. 2d 663 (C.A. 5), certiorari denied, 355 U.S. 825 (where the construction of a plant to be used for prefabricating bridge slabs and materials needed in the construction of a causeway connecting interstate highways, was held to be "in commerce" as "part of the main job even though preliminary to it and unseen or nonexistent in the final product." *Id.* at 669). The preparation of preliminary plans and

[10] This work was held covered despite the fact that the work was not *in* the river and was preliminary or preparatory to the main construction work, and was performed by an independent contractor, and despite the further fact that its beneficial effect upon navigability depended upon the future construction not only of the particular dam to be served by the reservoir but of a number of other similar tributary projects to be constructed over a period of years. The petition for certiorari in *Pennington-Winter*, which had been pending for over five months, was denied on the next decision day immediately after the *Alstate* decision.

specifications is no less an integral and essential part of the interstate project for which they specifically are designed, than the preliminary reservoir clearance in *Pennington-Winter*, or the construction of the prefabricating plant in *Archer*.

2. The court below mistakenly relied on *10 East 40th Street Co.* v. *Callus*, 325 U.S. 578, as authority for excluding respondents' employees from the coverage of the Act because respondents "may be likened to the owners of the general office building in the *Callus* case" in that they work for "a general miscellany of clients" (R. 153a). In no respect material to the Act's coverage can either respondents' enterprise or the employees' activities in this case be likened to *Callus*. In marked contrast, *neither the employer nor the employees* in *Callus* engaged directly in any interstate activities, none of the employees' work (general building maintenance service) was specifically designed for particular interstate projects, and the claim of coverage rested solely upon "thin" evidence of a general relationship to interstate manufacturing carried on by *some* of the building tenants elsewhere. Even on the "thin" evidence there presented, *Callus* found the question of coverage to be a very close one. Plainly, no such close borderline question is presented with respect to respondents' employees who are admittedly engaged directly, regularly, and substantially in interstate activities, including preparation of plans and specifications designed specifically for designated interstate projects, as well as "transportation, transmission, or communication" within the literal terms of the statutory definition (see *infra*, pp. 34-41).

That the Fourth Circuit has misapprehended the *Callus* decision in extending it to the admittedly inter-

state activities of respondents' employees is evident from the numerous decisions of this Court holding the Act applicable to employees of independent enterprises dealing with a miscellany of customers. Thus, in *Roland Electric Co.* v. *Walling*, 326 U.S. 657, the Court upheld coverage of employees of an independent electrical contracting company serving a general miscellany of customers, on the basis of evidence that the employees regularly performed work for 33 customers (out of a total of approximately 1,000) who were engaged in commerce or in production of goods for commerce. Similarly in *Thomas v. Hempt Bros.*, 345 U.S. 19, the Act was held applicable to employees of an independent enterprise operating a stone quarry and preparing cement mixtures and other materials for a miscellany of customers, among whom were "the Pennsylvania Turnpike, the Pennsylvania Railroad Company, an airport, an army depot, and a navy depot, * * *" and "[o]ther purchasers [who] used their concrete on 'projects which aided the flow of commerce' * * *" (345 U.S. at 20). The Court drew no distinction between this independent materialman, who dealt with the general miscellany of customers, and the Alstate Construction Company which prepared materials primarily for use in its own road construction work (*Alstate Construction Co.* v. *Durkin*, 345 U.S. 13, 15). Nor did it differentiate the independent materialman in *Tobin* v. *Johnson* (198 F.2d 130 (C.A. 8), certiorari denied, 345 U.S. 915)[11] who supplied a general mass of customers, coverage there having been sustained on

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[11] This case was cited in *Alstate* as one involving "similar facts" (345 U.S. at 15), and certiorari was denied March 16, 1953, the next decision day immediately after the *Alstate* decision.

the ground that a substantial proportion (about 50%) of the materials were furnished to various customers for use in road construction or in maintenance and repair of dikes and revetments on a navigable river. See also *Schulte Co. v. Gangi*, 328 U.S. 108, 118, sustaining coverage even of *building maintenance* employees in an independently operated building tenanted by a general miscellany of occupants, where the evidence showed that a sufficiently substantial proportion of the occupants were regularly engaged in producing various kinds of goods for shipment in interstate commerce.

The Fourth Circuit's mistaken view of the "local activity" which "the Act does not attempt to regulate" (R. 152a) also appears from the well-settled application of the Act to a wide variety of businesses serving locally a variety of customers, including electric and gas companies, water companies, ice companies, coal distributing companies and telephone companies.[12] In

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[12] *Lewis* v. *Florida Power & Light Co.*, 154 F.2d 751 (C.A. 5) (some of the electricity furnished for use in operating railroad signal lights and airport beacons); *Meeker Cooperative Light & Power Ass'n* v. *Phillips*, 158 F.2d 698 (C.A. 8); *New Mexico Public Service Co.* v. *Engel*, 145 F.2d 636 (C.A. 10) (supplying power, *inter alia*, to the Civil Aeronautics Authority for operating airline beacons and to miscellaneous other interstate instrumentalities and producers); *Davila* v. *Porto Rico Ry. Light & Power Co.*, 143 F.2d 236 (C.A. 1) (supplying power, *inter alia*, to a number of interstate producers); *Mitchell* v. *Mercer Water Co.*, 208 F.2d 900 (C.A. 3) (supplying substantial quantities of water and gas, *inter alia*, to interstate producers); *Atlantic Co.* v. *Walling*, 131 F.2d 518 (C.A. 5); *Chapman* v. *Home Ice Co. of Memphis*, 136 F.2d 353 (C.A. 6), certiorari denied, 320 U.S. 761 (ice companies among whose customers were fruit growers or railroads using the ice for refrigerator freight cars); *West Kentucky Coal Co.* v. *Walling*, 153 F.2d 582 (C.A. 6) (supplying substantial quantities of coal, *inter alia*, to some 15 or 18 interstate producers); *Schmidt* v. *Peoples Telephone Union of Maryville*, 138 F.2d 13 (C.A. 8) (telephone company serving

all these cases, coverage has been sustained by reason of the fact that among the general miscellany of customers were some interstate instrumentalities and interstate producers who were regular and substantial customers.

The application of the Act to such businesses was expressly approved by Congress at the time of the enactment of the 1949 Amendments,[18] as was the coverage ruling of *Roland Electric, supra,* p. 30. See Statement of the Majority of the Senate Conferees (95 Cong. Rec. 14874-75), which states that the work of such employees is covered by the Act *"whether they are employed by the producer of goods or by someone else who has undertaken the performance of particular tasks for the producer"* (*ibid.*, emphasis added). Similarly, the House Managers' report stated that the 1949 Amendments "are not intended to remove from the Act maintenance, custodial, and clerical employees" of the type held covered in *Kirschbaum* and in the public utility decisions, also expressly stating that such employees "will remain subject to the Act, *notwithstanding they are employed by an independent employer*

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local customers generally whose calls were primarily local but included a few regularly recurring interstate calls). Lower court decisions to the same effect are too numerous to cite.

[18] The House Report on the amendments specifically stated that "employees of public utilities, furnishing gas, electricity or water to firms within the State engaged in manufacturing, producing, or mining goods for commerce, will remain subject to the act." [Statement of the Managers on the Part of the House, 95 Cong. Rec. 14929.] Similarly, the Senate Report listed among the employees remaining within the coverage of the Act those engaged in "producing and supplying fuel, power, water * * *", citing with approval *Meeker Coop.* v. *Phillips*, *Lewis* v. *Florida Power & Light Co.*, and *West Kentucky Coal Co.* v. *Walling, supra,* fn. 12 [95 Cong. Rec. 14875].

* * *"' (95 Cong. Rec. 14929, emphasis added). While these statements were made with reference to the "production for commerce" phase of coverage (which was the coverage provision modified by the 1949 Amendments), the statements were obviously premised on a principle equally applicable to determining coverage of the "in commerce" phase (see *Jacksonville* and *Overstreet, supra*), *i.e.*, that the determining factor is the relationship of the *employee's work* to the interstate commerce regardless of the independent character of the *employer's* enterprise.

The nub of it is that the Fourth Circuit's criticism of the Eighth Circuit's *Brown Engineering* decision, *supra*, p. 22, for "seem[ing] to ignore" the "local" nature of *the employer's* business—which, according to the decision below, "gave color" to the *employees'* admittedly interstate activities (R. 153a)—reveals that the Fourth Circuit has missed the point that it is the functional relationship of the employees' particular work or activities to interstate commerce, rather than the general nature of the employers' business, that is decisive of coverage. "The test is," this Court has said, "whether *the work* is so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than, isolated, local activity," *Michell* v. *C.W. Vollmer & Co.*, 349 U.S. 427, 429 (emphasis added), and this must be "determined by practical considerations, not by technical conceptions" *(ibid.)*. A determination ignores "practical considerations," and relies on "technical conceptions," when it is based not on what the employees are doing and not on what their work has to do with the instrumentalities of commerce, but on whether the employer is a construc-

tion company or an architectural-engineering firm, and on whether the employer undertakes other kinds of contracts as well. The practical effect on the improvement of an airfield or a shipyard is not measured by the "independence" of the employer or the character of his other clients. It depends on the role played by the work of the employees in the particular improvement projects. To transpose the language of the court below, "It is this element which the [court below and respondents] seem to ignore" (R. 153a)

B. *The Interstate Communications and Transmission of Documents and Materials and the Interstate Travel, in which Respondents' Employees Regularly and Substantially Engage, is Engagement "In Commerce" Within the Act's Coverage.*

The clear-cut findings, in which both courts below concurred, are that respondents' two-state offices are closely coordinated and in continous communication, and that "all stenographic personnel employed in both offices" are "freely conceded" to be employed in the extensive interstate communication by telephone and correspondence, both between respondents' two offices and between these offices and out-of-state clients and contractors, and that the draftsmen work on plans, specifications, estimates, etc. "many of which are transmitted across state lines," and that the fieldmen "frequently travel across state lines" to gather data for the plans, specifications and estimates "which, in turn, are frequently transmitted out-of-state" (R. 5a-6a, 144a-146a). In view of these findings, the conclusion that none of these employees is engaged "in commerce" seems inexplicable. Here again it is evident that the

court was misled by its reliance on the factually and legally unsubstantiated assumption that respondents' business is "essentially local."

The employees' direct interstate communications by mail and telephone and interstate travel, which are admittedly a regular and substantial part of their duties required by the nature of respondents' geographic organization and multi-state operations, are not only "transportation, transmission or communication" within the literal terms of the statutory definition, but are undeniably "so directly and vitally related to the functioning of" and so "integral a part of" respondents' extensive interstate operations as a whole, as to be a part of those interstate operations, "rather than isolated, local activity," under any "liberal," "practical" or "realistic" view of the case. See *Mitchell* v. *Vollmer & Co.*, 349 U.S. 427, at 429; *Mitchell* v. *Kroger Co.*, 248 F.2d 935 (C.A. 8); and *Aetna Finance Co.* v. *Mitchell*, 247 F.2d 190 (C.A. 1).

Even in the absence of express statutory inclusion of interstate "communication," this Court has repeatedly held that the interstate use of the mails to transmit communications of the same or similar type here involved constitutes interstate commerce. See *North American Co.* v. *S.E.C.*, 327 U.S. 686, at 694-695 (a holding company's use of the "mails and facilities of interstate commerce," in order to "maintain its other relationships and contacts with its own subsidiaries," held to constitute interstate commerce); *Associated Press* v. *National Labor Relations Board*, 301 U.S. 103, at 128 ("interstate communication of a business nature, whatever the means of such communication, is interstate commerce * * *"); *International Textbook Co.* v.

Pigg, 217 U.S. 91, at 107 ("intercourse or communication between persons in different States, by means of correspondence through the mails" is commerce among the States).[14]

To the same effect are *United States* v. *Underwriters Assn.*, 322 U.S. 533, holding insurance companies to be in interstate commerce by reason of the "interrelationship, interdependence, and integration of activities" in all States in which they operate, which resulted in "a continuous and indivisible stream of intercourse among the states composed of collections of premiums, payments of policy obligations, and the countless documents and communications * * * " (322 U.S. at 541); *United States* v. *Shubert*, 348 U.S. 222, where the "transmission of applications, letters, memoranda, communications, commitments, contracts, money, checks, drafts and other media of exchange across State lines," occurring in the conduct of the business of producing locally legitimate stage attractions, was similarly held to constitute trade or commerce within the meaning of the Sherman Act; and *United States* v. *International Boxing Club of New York*, 348 U.S. 236, another Sherman Act case, decided the same day. These decisions, said the Court, accord with the "liberal con-

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[14] See also *Federal Trade Commission* v. *Civil Service T. Bureau*, 79 F.2d 113, at 114 (C.A. 6) "intercourse or communication between persons in different states by means of correspondence through the mails is commerce among the states * * *, especially where such intercourse and communication relate to regular continuous business and to the making of contracts and the transportation of books, papers, etc., pertaining to such business"); and *Bay City* v. *Frazier*, 77 F.2d 570, at 574 (C.A. 6) (holding an engineering contract for the construction of an out-of-state municipal waterworks system to be an interstate transaction because its performance required, among other things, "regular and continuous interstate communication and intercourse").

struction" that had been given the Sherman Act (348 U.S. at 226). The Court has similarly emphasized that the Fair Labor Standards Act, also, is "one that has been given a liberal construction" (*Mitchell* v. *C. W. Vollmer & Co.*, 349 U.S. 427, 429). While admittedly there are differences in the scope of the Sherman Act and this Act, the Court's decisions in the above cases were not predicated on the "affecting commerce" scope of the Sherman Act, but were construing the statutory language "trade or commerce * * * among the several States" (see *Shubert*, 348 U.S. at 226-227)—language identical to that of Section 3(b) of the Fair Labor Standards Act, which indeed goes further and expressly includes "transportation, transmission, or communication."

The Court's decisions are equally clear that interstate travel or movement of persons across state lines, even for non-commercial purposes, is interstate commerce. *Edwards* v. *California*, 314 U.S. 160 (movement of indigents across state lines is interstate commerce); see also *Hemans* v. *United States*, 163 F.2d 228, 239 (C.A. 6), certiorari denied, 332 U.S. 801 (upholding the validity of the Fugitive Felon Act, which restricted the movement of "one who travels in interstate commerce to avoid giving testimony in the state from which he flees"); *Caminetti* v. *United States*, 242 U.S. 470 (transportation of women across state lines for non-commercial immoral purposes is interstate commerce prohibited by the Mann Act); *Cleveland* v. *United States*, 329 U.S. 14 (transportation of a woman across state lines for purposes of a polygamous marriage is interstate commerce).

There is certainly nothing in the policy and purposes of the Fair Labor Standards Act which would warrant

straining to restrict its "in commerce" coverage as the decision below has manifestly done. On the contrary, such a restrictive construction of this Act is plainly inconsistent with this Court's ruling that "the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce" (*Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 567) and that "the policy of Congressional abnegation with respect to occupations affecting commerce is no reason for narrowly circumscribing the phrase 'engaged in commerce'" (*Overstreet* v. *North Shore Corp.*, 318 U.S. 125, 128). It is also inconsistent with the well-settled principle, most recently emphasized by this Court in *Mitchell* v. *Vollmer*, that the statutory terms of coverage of this Act must be given a "liberal" construction (349 U.S. at 429), and that the literal terms of the statutory definitions should be accorded the "breadth of coverage" consistent with the "terms of substantial universality" in which the broad purposes of the Act are stated (*Powell* v. *United States Cartridge Co.*, 339 U.S. 497, 516). These were the principles underlying recent decisions of the Eighth and First Circuits which upheld the coverage of interstate travel and interstate communications in circumstances comparable to the instant case. (*Mitchell* v. *Kroger Co.*, 248 F.2d 935 (C.A. 8), and *Aetna Finance Co.* v. *Mitchell*, 247 F.2d 190 (C.A. 1).

Kroger involved the coverage of interstate travel and interstate communications of auditors employed by a multi-state chain organization to make audits at its local retail units in two states, and to transmit their auditing reports to branch headquarters. Pointing out

that such communication and travel are "'transportation, transmission and communication' between states within the meaning and the literal terms of the statute" (248 F.2d at 939), the Eighth Circuit held that there is "nothing to justify Congressional intent to the contrary," and that, "[i]nstead of a strict or limited construction," this Court's decisions required "a liberal construction" of the statutory terms of coverage—in particular a construction that does "not narrowly circumscribe the meaning of the phrase 'engaged in commerce' *or detract in any way from the statutory definition as to* the meaning of commerce itself" (*id.* at 938, emphasis added). *Kroger* held not only that the auditors' interstate communication and travel were "literally within the Act's coverage" (*ibid*), but also, on the basis of practical facts comparable to those here, that such interstate communication and travel were not "merely incident to a local retail business" but were "a part and parcel of the Kroger Company's interstate activity" (*id.* at 939).

In *Aetna Finance,* the First Circuit held that employees of a branch office of a small loan company were engaged "in commerce" by reason of their interstate communication, correspondence and transmission of various reports and documents; even though over 95% of the branch office's business consisted of loans to local borrowers within the same state. The court found no difficulty in agreeing with the District Court's ruling that coverage of these activities was sufficiently sustained *either* by reason of the small proportion of the branch's business with out-of-state borrowers *or* by reason of the relationship of the branch employees'

work "to the conduct and furtherance of defendant's nationwide business" under the "broad guiding principles" of this Court's decisions (247 F.2d at 192, affirming 144 F.Supp. 528 at 533).[15]

The sole reason stated in the decision below for not applying what the court itself recognized as "this well-established line of authority" (R. 150a) was its mistaken assumption that the *employers'* business here is not interstate in character but is "essentially local" and that, therefore, the interstate communication and travel "is merely incidental to the local enterprise" (R. 151a). This assumption, as pointed out *supra*, pp. 20-21, 24 fn. 6, 31-35, is contradicted by the undisputed evidence in this record. The interstate communications and travel by respondents' employees are undeniably necessitated by and essential to respondents' two-state administrative organization, its overseas associations and its extensive interstate operations both for out-of-state clients and for interstate instrumentalities or facilities. Whatever justification there might be for excluding from the coverage of the Act interstate communications and travel which are merely incidental to an otherwise purely local business,[16] there

[15] The ruling below on interstate communication is also in conflict with the decision of the District Court in *Durkin* v. *Joyce Agency, Inc.*, 110 F.Supp. 918 (N.D. Ill.), which was affirmed *per curiam* by this Court *sub nom. Mitchell* v. *Joyce Agency, Inc.*, 348 U.S. 945, reversing the Seventh Circuit's decision (211 F.2d 241), which had held specifically, *inter alia*, that so-called "internal" interstate communication was not within the coverage of the Act.

[16] It is *not* the Government's position that *any* interstate correspondence, even though merely incidental to a purely local business or professional practice, is within the Act's coverage. On the contrary, the administrative interpretation has expressly stated that the Act's coverage of interstate communication "does not mean that any use by an employee of the mails and other channels of communication is sufficient to establish coverage," but only where the

is no reasonable ground to be found in either the terms or purposes of this Act for excluding from its coverage employees regularly engaged in the interstate activities necessitated by the nature and organization of a business which has the admitted interstate aspects and extensive interstate operations of respondents' business.

C. *The Preparation of Plans, Specifications and Drawings for Transmission Across State Lines, or for Use in the Construction of Repairs or Improvements to Interstate Instrumentalities and Facilities, Constitutes "Production of Goods for Commerce."*

Apparently both courts below concede that, if the plans, specifications and drawings are "goods" within the meaning of the statutory definition in Section 3(i), the employees preparing them are "producing" ("handling, transporting, or in any other manner working on") them for "commerce" ("transmission * * * between any State and any place outside thereof") within the terms of Sections 3(j) and (b) of the Act. Since a substantial portion of these plans and specifications are prepared specifically for use in the repair or improvement of interstate instrumentalities or facilities, they are also, we submit, produced "for commerce"

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employee's duties require such "regular and recurrent" and "continued" use. (Interpretative Bulletin on General Coverage, Part 776.10, May 1950, 15 F.R. 2925). This distinction has been made specifically with respect to correspondence and communications merely incidental to an ordinary local practice of law, medicine or other profession, so that coverage is asserted only where the practice is so conducted as to necessitate regular and continuous interstate communication with out-of-State clients or with closely affiliated out-of-State offices or associates (as is manifestly the nature of respondents' operations).

no less than the preparation of road materials for these same purposes held to be within the Act's coverage in *Alstate Construction Co. v. Durkin,* 345 U.S. 13, and *Thomas* v. *Hempt Bros.,* 345 U.S. 19. Moreover, this work is "production of goods for commerce," whether or not the plans and specifications themselves are regarded as "goods."

1. The view that plans and specifications are not "articles or subjects of commerce" within the statutory definition of Section 3(i) simply because they represent the "embodiment of ideas" (R. 148a) is difficult to reconcile with the ruling in *Western Union Telegraph Co.* v. *Lenroot,* 323 U.S. 490, that "telegraphic messages are clearly 'subjects of commerce' and hence that they are 'goods' under this Act," since prior to the adoption of the statutory definition it had been held (in *Western Union Telegraph Co.* v. *Pendleton,* 122 U.S. 347) that " 'ideas, wishes, orders, and intelligence' are 'subjects' of the interstate commerce in which telegraph companies engage" (323 U.S. at 502-503). As pointed out by Judge Learned Hand in the Second Circuit's decision in *Western Union,* the legislative history contains "unmistakable evidence of a purpose to extend the definition of subdivision [3]i to everything which had been considered a 'subject of commerce'; that is, to whatever Congress could regulate as such a subject" (141 F.2d 400 at 403).[17] The bill as originally

[17] This Court expressly approved the rulings of the Court of Appeals on the meaning of the statutory definitions of "goods" and "produced" (323 U.S. at 502-504), although it reversed on the wholly different ground that the physical tangible "message" "never leaves the originating office" and hence was not "shipped" within the terms of Section 12(a) of the Act, (*id.* at 505-506)—i.e., "the difficulty there was that the telegrams, *taken as documents,* were not 'shipped' across a state line" (see *Bozant* v. *Bank of New York,* 156 F.2d 787, 790 (C.A. 2), emphasis added).

introduced defined "goods" as "goods, wares, products, commodities, merchandise, or articles of trade of any character" (Section 2(a)(21) of S. 2475 and of H.R. 7200, 75th Cong., 1st Sess.). The Senate Committee on Education and Labor changed "trade" to "commerce" and added the words "or subjects" after the word "articles," thus putting the definition into its present form. (See S. 2475, Committee Print to Accompany S. Rep. 884, 75th Cong., 1st Sess.). "[I]t must always be remembered," a subsequent decision of the Second Circuit reiterated, that Section 3(i) "was amended in Congress to go beyond 'wares, products, commodities, merchandise, or articles,' and in addition to include 'subjects of commerce of any character.'" (*Bozant* v. *Bank of New York,* 156 F.2d 787, at 790).

The physical embodiment of mental ideas into tangible and bulky plans and specifications is obviously the product of considerable routine, clerical and other physical work, as is evident from a mere glance at some of the plans and specifications for industrial projects involved in this case. These physical products are tangible materials which can be and are "subjects of commerce" (*i.e.,* interstate "transportation" or "transmission") within the literal terms of the statutory definitions; and their physical production unquestionably requires the type of routine, clerical, and physical workers with whom this Act is concerned.

The rationale of the *Western Union* decision has been applied by other Courts of Appeals and by the district courts to a wide variety of documents comparable to the plans, specifications and documents in this case. See *Baldwin* v. *Emigrant Industrial Savings Bank,* 150 F.2d 524 (C.A. 2), certiorari denied, 326 U.S. 767 (mimeographing and setting type for "advertising

matter" and "reading, editing, and preparing * * * manuscripts for the printer" held "production of goods"); *Bozant* v. *Bank of New York*, 156 F.2d 787, 790 (C.A. 2) ("preparing, executing or validating bonds, shares of stock, commercial paper, bills of lading and the like" held "production of goods");[18] *Darr* v. *Mutual Life Insurance Co.*, 169 F.2d 262, 264-265 (C.A. 2), certiorari denied, 335 U.S. 871 (insurance policy applications and insurance policies are "goods produced for commerce"); *Ullo* v. *Smith*, 177 F.2d 101 at 104 (C.A. 2), affirming as "clearly correct" the ruling of the district court (62 F.Supp. 757 at 762) that the gathering, stenciling and mimeographing of "news regarding New York merchandising and markets" for distribu-

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[18] While the *Bozant* ruling was limited to "commercial" documents such as "bonds, shares of stock, commercial paper, bills of lading and the like," and excluded "mere writing of letters or the drawing of papers, which have no value of their own except as records" (156 F.2d at 790), it did not foreclose the conclusion that "the preparation of advertisements, brochures, pamphlets and other advices mailed out to customers," also, "may be a production of 'goods' though it be only auxiliary to a business that involves no other production" (*id.* at 789). The plans and specifications in the instant case, we submit, are plainly more of this tangible, utilitarian character than mere letter-writing or records.

Indeed, the use made of the plans and specifications—by bidders, contractors, suppliers of materials, as well as by the construction crews—can hardly be characterized as "non-commercial."

Moreover, *Bozant's* emphasis on the "commercial" character of the documents must be discounted by the fact that the decision (handed down July 8, 1946) antedated this Court's decision in *Powell* v. *United States Cartridge Co.* (decided May 8, 1950), discussed in the text, *infra*, pp. 46-47). Similarly, the district court's decision in *McComb* v. *Turpin*, 81 F.Supp. 86 (D. Md.) (decided November 30, 1948), on which the court below heavily relied (R. 146a-147a) antedated *Powell*, and rested on the rationale (repudiated in *Powell*) that the statutory definition of "goods" includes only products or articles of a "commercial character" that are "sold or offered for sale to the public generally" (81 F.Supp. at 89, 90).

tion to subscribers is "production of goods"; *Union National Bank of Little Rock* v. *Durkin*, 207 F.2d 848, 849, 850 (C.A. 8) (holding that it is "no longer * * * open to question" that preparation and handling of "stocks, bonds and other securities" and "checks, notes, drafts, and other commercial paper" by bank employees, and of "policy applications, policies, premium payments, claims and benefit payments," by insurance company employees constitute "production of goods for commerce"); *Meeker Cooperative Light and Power Assn.* v. *Phillips*, 158 F.2d 698, 699 (C.A. 8) (affirming the district court's ruling (63 F.Supp. 733, 740) that the preparation of "correspondence, reports, fiscal statement, checks and other documents" constitute "production of goods".[19]

2. The view that such work is outside the contempla-

[19] To the same effect are the following district court decisions: *Lofther* v. *First National Bank of Chicago*, 48 F. Supp. 692, 697 (N.D. Ill.) affirmed on other grounds, 138 F.2d 299 (C.A. 7) (banking documents, written reports, correspondence and accounts prepared by an accountant); *Hogue* v. *National Automotive Parts Assn.*, 87 F.Supp. 816 (E.D. Mich.) (gathering and compiling statistical data as to prices, business activity and similar matters, and distributing it to members of a trade association); *Mathisen* v. *Evanston Trust Bank* (not officially reported but found in 6 WH Cases 882, 12 Labor Cases ¶ 63,726 (N. Ill., 1947) (checks, drafts, and other commercial paper); *Durkin* v. *Shone*, 112 F.Supp. 375 (E.D. Tenn.) (addressing, handling and mailing advertising materials); *Hanzely* v. *Hooven Letters, Inc.*, 44 N.Y.S. 2d 398 (City Court N.Y. 1943) (advertising letters); *Mitchell* v. *Tippett* (not officially reported but found in 13 WH Cases 774 and 35 Labor Cases, para. 71,723 (W.D. N. Car., June 25, 1958) (printing bank check forms and miscellany of other commercial business forms); *Thomas et al.* v. *Associated Cleaning Contractors* (not officially reported, but found in 13 WH Cases 777 and 35 Labor Cases, para. 71,724) (N.D. Ga., July 12, 1958) (preparation of printed and mimeographed tariff catalogs, statistics and information reports for members of motor carriers association, and preparation of credit investigation reports for customers of retail credit company).

tion of the Act because it is *incidental* to professional planning and advice is contradicted by *Borden Co.* v. *Borella*, 325 U.S. 679, where maintenance employees of Borden's central office building for its executive officers and administrative employees were held within the Act's coverage, on the ground that the "economic production" with which this Act is concerned includes "not simply the manual physical labor involved in changing the form or utility of a tangible article" but also "planning and controlling" and the work of one "who conceives or directs a productive activity" (325 U.S. at 683). The apparent confusion by the court below of the Act's "professional" exemption (Section 13(a)(1)) with the Act's general coverage provisions is contrary to this Court's explicit statement that: "Indeed, the fact that § 13(a)(1) specifically excludes * * * those employees employed in a bona fide executive, administrative or professional capacity is clearly consistent with the conclusion that these activities are included within" the coverage of the Act, and "that full effect should be given that fact unless otherwise provided" (325 U.S. at 684).[20]

3. Similarly, the position that plans and specifications are not "goods for commerce" because they lack the characteristics of ordinary articles sold commercially to the public generally (R. 148a-149a) is contrary to the basic rationale of *Powell* v. *United States Cartridge Co.*, 339 U.S. 497, which explicitly repudiated the contention that coverage is limited to "commercial" transactions or to "articles that are intended for sale, exchange or other trading activities" (339 U.S. at 512), and emphasized the "terms of sub-

[20] The "professional" exemption is not involved in the present case. See footnote 1, *supra*, p. 3.

stantial universality" in which the broad statutory purposes and the statutory coverage definitions are stated (*id.* at 509-516). "Breadth of coverage was vital to its mission" (*id.* at 516), said the Court, and the primary legislative purpose "was concerned directly with any widespread existence of substandard wages, hours or working conditions" which "could be reached by Congress through its regulation of interstate transportation of the products of those conditions" (*id.* at 509-510, fn. 12). Quoting the statutory definition of "commerce" with emphasis on the language *"transportation * * * among the several States or from any State to any place outside thereof"* (*ibid.*, emphasis the Court's), the Court ruled that this language includes "interstate shipments or transportation as such, and not merely * * * shipments or transportation of articles that are intended for sale, exchange or other trading activities," citing at this point previous decisions holding that the federal "commerce" power extended to all kinds of "non-commercial" interstate movements and transactions (*id.* at 512). The broad scope of the *Powell* decision's construction of the term "articles or subjects of commerce of any character" is indicated by its reliance (*ibid.*, fn. 14) upon such decisions as *Edwards* v. *California*, 314 U.S. 160 (movement of indigents across state lines); *Thornton* v. *United States*, 271 U.S. 414 (diseased cattle ranging across state lines); *Caminetti* v. *United States*, 242 U.S. 470 (transportation of women across state lines for non-commercial immoral purposes); *United States* v. *South-Eastern Underwriters Assn.*, 322 U.S. 533 (insurance transactions, including transactions and communications between local agents and their out-of-state home offices).

4. The reasoning below is also inconsistent with *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13, since the preparation of plans and specifications specifically for use in the improvement of interstate facilities cannot be distinguished from the preparation of road materials for these same purposes, except on the unwarranted assumption that the statutory definition of "goods" is limited to "products" ordinarily sold to the public. The preparation of the plans and specifications for a specific highway improvement project, no less than the preparation of the road materials pursuant to those plans and specifications, directly serves the interstate commerce on that highway. While the road materials may be physically incorporated into the road, the plans and specifications guide and determine the execution of the improvement in every detail (including the instructions and specifications for the supplies and materials to be physically incorporated in the structures) from the beginning to the end of the construction work, and are thus equally "for" the "main [interstate commerce] job even though preliminary to it and unseen or nonexistent in the final product." Cf. *Archer* v. *Brown & Root, Inc.*, 241 F. 2d 663 (C.A. 5), at 669.[21] Both "serve commerce" and are produced specifically and directly "for commerce" in the same degree.

Even if such plans and specifications are not themselves "goods," their preparation is at least a "closely related process or occupation directly essential" to the production of the supplies and materials "for" such commerce. For there can be no question, under the *Alstate* and *Hempt* (*Thomas* v. *Hempt Bros.*, 345 U.S. 19) decisions, that the materials and supplies produced

[21] This statement, made in connection with the Fifth Circuit's holding in *Archer* that construction of the prefabricating plant was "in commerce" (see *supra*, p. 28), is *a fortiori* applicable here.

for physical incorporation into the interstate instrumentalities are "goods" produced for commerce, and the plans and specifications are no less "closely related" or "directly essential" to the production of these goods than the preparation of "tools, dies, designs, patterns * * * or other equipment" used by the purchaser "in the production of other goods for interstate commerce," or the furnishing of gas, electricity, fuel or water for use in the production of goods for commerce, which Congress has expressly recognized as "closely related and directly essential to the production of goods for commerce" within the terms of Section 3(j), as amended in 1949. See House Conferees' Report of the 1949 Amendments, 95 Cong. Rec. 14874, 14875;[22] and Report of the Majority of Senate Conferees, 95 Cong. Rec. 14928, 14929.[23] See also, *supra*, p 32.

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[22] "The work of employees of employers who produce or supply goods or facilities for customers engaged within the same State in the production of other goods for interstate commerce may also be covered as closely related and directly essential to such production. This would be true, for example, of employees engaged in the following activities:

1. Production of *tools, dies, designs, patterns,* machinery, machinery parts, mine props, industrial sand, or other equipment used by purchaser in producing goods for interstate commerce. *Holland* v. *Amoskeog Machine Co.* (44 F.Supp. 884 (D.C. N.H.)); *Tormey* v. *Kiekhafer Corp.* (76 F.Supp. 557 (E.D. Wis.)); *Walling* v. *Amidon* (153 F. (2d) 159 (C.A. 10)); *Walling* v. *Hamner* (64 F.Supp. 690 (W.D. Va.)); *Roland Electrical Co.* v. *Walling* (326 U.S. 657)." (Emphasis added.)

[23] "The bill as agreed to in conference also does not affect the coverage under the act of employees who repair or maintain buildings in which goods are produced for commerce (*Kirschbaum* v. *Walling*, 316 U.S. 517) or who make, repair, or maintain machinery or tools and dies used in the production of goods for commerce. Likewise, employees of public utilities, furnishing gas, electricity or water to firms within the State engaged in manufacturing, producing, or mining goods for commerce, will remain subject to the act. All the employees mentioned in this paragraph are doing work that is closely related and directly essential to the production of goods for commerce."

5. Finally, the Fourth Circuit's reliance on the paragraph in the Labor Department's Interpretative Bulletin relating to employees of a "local architectural firm," (R. 147a) is misplaced. The term "local architectural firm," and the paragraph in the Interpretative Bulletin, are patently not descriptive or respondents' multi-state practice or of its extensive engineering operations. The statement in the bulletin is merely a restatement (indeed, a quotation) of legislative history from the House Conferees' Report on the 1949 Amendments, which refers only to "the preparation of plans for the alteration of buildings *within the state* which are used to produce goods for interstate commerce." (95 Cong. Rec. 14929, par. 5, emphasis added.) It is expressly limited to a "local" business conducted *within the confines of a single state* and related to interstate commerce only indirectly and remotely by reason of the fact that some of the local buildings for which it prepares plans may be "used to produce goods for interstate commerce." This is hardly descriptive of respondents' architectural-engineering enterprise which is not only specifically organized so as to conduct its operations across state lines, but is also engaged extensively in work for out-of-state projects and out-of-state clientele, and, in addition, engages directly and substantially in work for the improvement and expansion of interstate instrumentalities and facilities. The content of the term "local architectural firm" is evident from the other examples cited in the legislative history immediately preceding and following the reference to a "local architectural firm"—*i.e.*, "a local independent nursery concern" whose business might include "mowing the lawn around the plant of a customer *within the state* engaged in producing goods for interstate commerce," and "a local exterminator service firm" whose

employees "work *wholly within the state*" serving generally "buildings *within the state*" some of which may be "used to produce goods for interstate commerce" (95 Cong. Rec. 14929, emphasis added).[24]

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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[24] The court also relies (R. 147a) on footnote 28 of the Bulletin which contains a "see also" citation of *McComb* v. *Turpin*, 81 F.Supp. 86 (D. Md.). The Fourth Circuit's construction of this "see also" citation as an administrative acceptance and adoption of the reasoning and holding of that decision is, we submit, far-fetched and unwarranted. Even if the citation of that decision could be construed as an administrative acceptance of it, the factual record in the instant case is so different in crucial respects as to preclude any inference that the firm here involved qualifies as a "local architectural firm" within the meaning of the bulletin. As the opinion in the *Turpin* decision repeatedly emphasized, "the stipulation of facts [which was the sole evidence in that case] furnishes only meager information" (81 F.Supp. at 91), showing only that the employees' services related mostly "to the original construction of buildings rather than to additions or alterations" (*id.* at 88), and, particularly, that it was *"not contended in this* [the *Turpin*] *case that any of the defendants' employees are engaged in interstate commerce"* as distinguished from the *"production of goods for commerce"* (*id.* at 88; see also 90, 92, 94; emphasis the court's). It was because of the meagerness and deficiencies in the record that the decision not to appeal the *Turpin* case was made.

APPENDIX

Respondents' Projects for Improvement, Repair or Enlargement of Interstate Instrumentalities or Facilities

1. Airfields and Airplane Facilities

Widening streets on a naval operating base in the vicinity of the base motorpool and post exchange, and extending and paving plane taxiways and parking aprons at the Naval Air Station installation at Oceana, Virginia, which is a naval jet base and part of the East Coast defense system for intercepting enemy aircraft (Stip. R. 16a; Job No. 928, R. 25a). Replacing paving between hangars at the Naval Air Station at Norfolk, Virginia (Stip. R. 16a; Job No. 881, R. 22a). It was agreed at the trial that the Navy airplanes using both these facilities regularly fly across State lines (R. 84a).

Repair and alterations of hangars at the Naval Air Station at Oceana, Virginia (a naval jet air base, part of the East Coast defense system for intercepting enemy aircraft) (Jobs Nos. 892, 892-1; Stip. R. 16a, 22a, 23a); the Naval Air Station in Washington, D. C. (Job No. 963, R. 29a, repairs to three hangars); and the Naval Air Station at Norfolk, Virginia (Job No. 901, R. 23a) (alterations to Hangars LP4 and LP14); advance planning for runway extension, Byrd Field (Job No. 822, R. 20a); advance planning report for pneumatic test facility, Naval Air Station, Norfolk, Virginia (Job No. 921, R. 25a); estimates for Pinecastle Air Force Base, Florida (Job No. 833, R. 21a); pile test, Langley Field, Virginia (Job No. 835, R. 21a); estimates for Beaufort, South Carolina, Airfield (Job No. 882, R. 22a); advance planning, Naval Air Station, Norfolk, Virginia (Job No. 748, R. 18a)

and work relating to Patuxent Air Station, Maryland (Job No. 869, R. 22a).

2. Shipyards

Repairs to buildings located at the United States Navy Ship Yard, Portsmouth, Virginia (Job No. 948, R.28a—repairs to 10 buildings, and Job No. 952, R. 28a—repairs to buildings) and other miscellaneous projects (Jobs Nos. 853 and 903; R. 21a, 23a); repairs to Pier 12, Naval Operating Base, Norfolk, Virginia (Job No. 965, R. 29a); and work relating to the machine shops and administrative buildings at the Norfolk Navy Yard and Norfolk Naval Base, Norfolk, Virginia (Stip. R. 16a; Job No. 920, R. 25a).

3. Radio and Television Facilities

Relocation of the Coast Guard Radio Station at Oceana, Virginia (Job Nos. 785, 917, R. 19a, 24a). Making the necessary site examination and preparing the advance planning report for relocating the Coast Guard Radio Station at Oceana, Virginia, which is a part of the Oceana Naval Air facility. When the new station is completed, the old station will be abandoned. A letter of intent to proceed with the final plan and specifications for this project has been received by appellees from the Navy (R. 69a-70a). Work relating to television station WAVY, Portsmouth, Virginia (Job No. 754, R. 18a).

4. Turnpike and Road Improvements, Bus Terminal Replacement and Water and Sewer Utilities

Road improvements, Oceana, Virginia (Job No. 911, R. 24a); Richmond Turnpike (Job No. 814, R. 20a); Old Dominion Turnpike Authority (Job No. 847, R. 21a); road survey, Columbia, North Carolina (Job No. 788, R. 19a). Replacement of the Trailways Bus

Terminal in Washington, D. C. (R. 90a). Numerous water and sewer designs for the Washington Sanitary Commission (Job Nos. 893, 893-1 through 893-3, 939, 939-1 through 939-24; R. 23a, 26a-27a).

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